



October 29, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o 236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

RE: CG Docket No. 02-278
ccAdvertising Petition for Declaratory Ruling on Preemption of North Dakota
Telemarketing Rules / Comment of SoundBite Communications Inc (SoundBite")

Ladies and Gentlemen:

SoundBite welcomes this opportunity to support ccAdvertising's request for a declaratory ruling that section 51-28-02, North Dakota Code ("North Dakota Law"), is pre-empted by the Telemarketing Consumer Protection Act of 1991, 47 U.S.C. 227 et seq. ("TCPA"), as implemented by the rules of the Commission, 47 C.F.R. Part 64 ("TCPA Rules").

By way of introduction, SoundBite is a rapidly growing company, located in the Greater Boston, Massachusetts area that provides software, services and technology to a wide array of companies, non-profits and political groups throughout the United States. SoundBite's technology enables these clients to create and transmit pre-recorded voice messages to interactively communicate with their customers, donors or constituents.

It is indisputable that North Dakota Law, as applied by the State of North Dakota ("State"), conflicts directly with the TCPA, as implemented by TCPA Rules. The State asserts that North Dakota Law prohibits, with a few minor exceptions, both the interstate and intrastate transmission of telephonic pre-recorded messages unless prior consent is obtained or an established business relationship is present. This would effectively prohibit most interstate telephonic political polling and charitable solicitations through the use of pre-recorded messages. In contrast, section 64.1200 (a)(2)(ii) and section 64.1200(a)(2)(v) of the TCPA Rules expressly authorize the interstate transmission of pre-recorded messages to conduct political polling and solicit charitable solicitations without prior consent or an established business relationship. It is obvious that North Dakota Law is more restrictive than the TCPA Rules in this area.

Jurisdiction over the transmission of interstate pre-recorded telephonic messages is fully and exclusively vested with the Commission. This emanates from the unique and sweeping authorization that the Commission has received from Congress through the TCPA to regulate the transmission of pre-recorded messages. Section 227(b)(1)(B) of the TCPA expressly prohibits the transmission of pre-recorded messages unless an emergency is present, prior consent is obtained, **or is exempted by rule or order of the**

Commission (emphasis added). This means that Congress has solely and exclusively granted to the Commission the authority to create exemptions from Congress' near absolute prohibition on the transmission of pre-recorded messages. Section 227(e) of the TCPA further provides that if and when exemptions are created by the Commission to allow the transmission of pre-recorded messages, states may pass more restrictive rules than the Commission only in the area of intrastate calling.

The Commission by section 64.1200(a)(2) of TCPA Rules has narrowly crafted four (4) exemptions which authorize the transmission of the pre-recorded messages - if the call 1) is not made for a commercial purpose, such as political polling; 2) is commercial but not a solicitation; 3) is made where an established business relationship is present; or 4) is made by tax exempt non-profits. Under the statutory framework of the TCPA these exemptions must be creation of the FCC and can be modified, amended, or repealed only by or with the consent of FCC.

While the TCPA allows a state to enact more restrictive requirements or even prohibitions concerning these FCC created exemptions, it may do so only in the area of intrastate calling. To allow any state or for that matter another federal agency to act otherwise would in effect be overriding the statutory framework of the TCPA in the regulation of the transmission of pre-recorded messages and completely frustrate its intended purpose. Under TCPA Congress only permits the transmission of pre-recorded messages where the FCC allows it. The express statutory authority to the FCC under the TCPA to carefully create and craft exemptions would be rendered a nullity if any state or other federal agency could simply change or ignore these exemptions or for that matter, create their own.

In summary, under the TCPA the Commission has sole and exclusive jurisdiction over the regulation of the transmission of interstate pre-recorded messages. The TCPA Rules must therefore trump conflicting state laws or rules.

Respectfully,

/s/ Peter Shields

Peter Shields, President and Chief Executive Officer